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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Salvador Sanchez Macias,
9 Petitioner
-vs-
10 Charles L. Ryan, et al.,
Respondents.

CV-13-0943-PHX-SRB (JFM)

Report & Recommendation On Petition
For Writ Of Habeas Corpus

11 **I. MATTER UNDER CONSIDERATION**

12 Petitioner, presently incarcerated in the Arizona State Prison Complex at
13 Florence, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §
14 2254 on May 6, 2013 (Doc. 1). On September 26, 2013 Respondents filed their
15 Response (Doc. 12). Petitioner filed a Reply/Traverse on October 7, 2013 (Doc. 13).

16 The Petitioner's Petition is now ripe for consideration. Accordingly, the
17 undersigned makes the following proposed findings of fact, report, and recommendation
18 pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules
19 of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil
20 Procedure.

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22 **II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND**

23 **A. FACTUAL BACKGROUND AND PROCEEDINGS AT TRIAL**

24 On April 5, 2010, Petitioner was indicted on two counts of sexual conduct with a
25 minor, class 2 felonies and dangerous crimes against children. (Exhibit B, Indictment.)
26 (Exhibits to the Answer, Doc. 12, are referenced herein as "Exhibit ____.") The
27 indictment alleged that on March 26, 2010, Petitioner engaged in sexual intercourse or
28 oral sexual contact with a minor under the age of 15 years, to wit: digital penetration of

1 the minor's vagina (Count 1) and anal contact (Count 2). (*Id.*)

2 Counsel was appointed, and on September 21, 2010, Petitioner entered into a
 3 written Plea Agreement (Exhibit C), wherein he agreed to plead guilty to Count One,
 4 sexual conduct with a minor, and an amended Count Two, attempted molestation of a
 5 child. In exchange, the parties stipulated to a sentence of 20 to 27 years flat on Count
 6 One, and successive lifetime probation on Count Two. Petitioner entered his plea on the
 7 same date, and the plea was accepted. (Exhibit D, R.T. 9/21/10.)

8 On February 22, 2011, Petitioner was sentenced to a presumptive term of 20 years
 9 on Count One and lifetime probation on Count Two. (Exhibit E, R.T. 2/22/11 at 24-25;
 10 Exhibit F, Cond. of Probation.)

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12 **B. PROCEEDINGS ON DIRECT APPEAL**

13 As a pleading defendant, Petitioner had no right to a direct appeal. (Exhibit G,
 14 Notice of Rts. of Rev. (citing Ariz. Rev. Stat. § 13-4033, etc.).) Petitioner did not file a
 15 direct appeal. (Petition, Doc. 1 at 2.)

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17 **C. PROCEEDINGS ON POST-CONVICTION RELIEF**

18 Petitioner commenced his first post conviction relief proceedings by filing an
 19 untimely Notice of Post Conviction Relief (Exhibit H) on July 26, 2011, some five
 20 months after sentencing. Counsel was appointed. (Exhibit I, M.E. 7/29/11.) Counsel
 21 filed a Petition (Exhibit J) to permit late filing of a PCR petition, which was granted.
 22 (Exhibit A, Docket at items 52, 54.) Ultimately, counsel filed a Notice of Completion of
 23 Review (Exhibit N), evidencing an inability to find a tenable issue for review. Petitioner
 24 was granted leave to file a *pro per* petition. (Exhibit A, Docket at item 63.)

25 Petitioner filed his *pro per* PCR petition on November 26, 2012 (Exhibit P),
 26 arguing newly discovered evidence that the victim suffered no injury to her vagina,
 27 justifying a lower, mitigated sentence. The PCR Court summarily dismissed the petition,
 28 finding no colorable claim was presented because the evidence was not newly

1 discovered, was provided at the time of sentencing, was cumulative to other evidence at
 2 sentencing, and thus would not have changed the sentence. (Exhibit S, M.E. 2/12/13.)

3 Petitioner then filed a Petition for Review (Exhibit T) by the Arizona Court of
 4 Appeals, arguing that the prosecution had failed to disclose the absence of injury, as
 5 required under Arizona law and *Brady v. Maryland*, 400 U.S. 841. The state responded
 6 (Exhibit U), but no ruling has yet been issued by the Arizona Court of Appeals.

D. PRESENT FEDERAL HABEAS PROCEEDINGS

9 **Petition** - Petitioner commenced the current case by filing his Petition for Writ of
 10 Habeas Corpus pursuant to 28 U.S.C. § 2254 on May 6, 2013 (Doc. 1). Petitioner's
 11 Petition asserted two grounds for relief:

12 In Ground One, Petitioner alleges his Fifth, Sixth and Fourteenth
 13 Amendment rights were violated when the trial court changed the
 14 plea agreement without Petitioner's knowledge or permission, by
 15 the prosecutor's misrepresentation of Arizona statutes in the plea
 16 agreement, and because Petitioner's counsel was ineffective by not
 objecting to changes to the plea agreement. In Ground Two,
 Petitioner asks whether Arizona Rule of Criminal Procedure 32.3
 (A.R.S. § 13-4233) is unconstitutional because "it innates the
 suspension of a writ of habeas corpus to Arizona state prisoners."

17 (Order 8/23/13 at 2.) In the Service Order, the Court dismissed Ground Two as failing to
 18 assert a cognizable violation of the Constitution, laws of treaties of the United States.

19 **Response** - On September 26, 2013, Respondents filed their Response
 20 ("Answer") (Doc. 12). Respondents argue that Petitioner's claim was not fairly
 21 presented to the Arizona Court of Appeals, that his state remedies are unexhausted and
 22 procedurally defaulted. Respondents argue that a stay to allow exhaustion is not
 23 appropriate because the claim is not meritorious and Petitioner has failed to show good
 24 cause for his failure to properly exhaust. Alternatively, Respondents argue that if the
 25 claim is merely unexhausted, this Court should deny the claim on its merits.

26 **Reply** - On October 7, 2013, Petitioner filed a Reply (Doc.13). Petitioner argues:
 27 (1) the Arizona Court of Appeals' failure to timely resolve his petition for review creates
 28 an absence of state corrective process, eliminating any failure to properly exhaust state

1 remedies (*id.* at 4); (2) any process is ineffective because the Arizona Attorney General
 2 has undertaken representation of Respondents (*id.*); (3) this court has discretion to
 3 bypass the exhaustion issue (*id.* at 5); (4) any procedural default should be excused to
 4 avoid a fundamental miscarriage of justice (*id.*); (5) he filed the instant petition to avoid
 5 the expiration of the statute of limitations (*id.*); (6) he is alleging jurisdiction defects and
 6 constitutional violations based upon the judge's alteration of the plea agreement, and the
 7 prosecutor's misrepresentation of the potential sentence (*id.* at 5-6); and (7) he has
 8 established cause and prejudice and a fundamental miscarriage of justice (*id.* at 7-9).

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11 **III. APPLICATION OF LAW TO FACTS**

12 Respondents argue this Court should either dismiss the Petition on the basis of a
 13 procedural default, or find it simply unexhausted and deny it on the merits. Petitioner
 14 argues that there is an absence of state corrective process, thereby resulting in
 15 exhaustion, or that any procedural default should be excused on the basis of cause and
 16 prejudice, or to avoid a fundamental miscarriage of justice.

17 Here, however, there is a pending state proceeding. Accordingly, the undersigned
 18 will recommend dismissal as a matter of abstention.

19 **Petition Wholly Unexhausted** - "Habeas petitioners have long been required to
 20 adjudicate their claims in state court—that is, 'exhaust' them before seeking relief in
 21 federal court. This requirement is 'grounded in principles of comity[,] as it gives states
 22 the first opportunity to address and correct alleged violations of state prisoner's federal
 23 rights.'" *King v. Ryan*, 564 F.3d 1133, 1138 (9th Cir. 2009).

24 "A petitioner fairly and fully presents a claim to the state court for purposes of
 25 satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum,
 26 (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for
 27 the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005).

28 Therefore, "to exhaust one's state court remedies in Arizona, a petitioner must

1 first raise the claim in a direct appeal or collaterally attack his conviction in a petition for
2 post-conviction relief pursuant to Rule 32.” *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th
3 Cir. 1994). Only one of these avenues of relief must be exhausted before bringing a
4 habeas petition in federal court. This is true even where alternative avenues of reviewing
5 constitutional issues are still available in state court. *Brown v. Easter*, 68 F.3d 1209,
6 1211 (9th Cir. 1995).

7 Here, none of the claims asserted by Petitioner in his habeas Petition have been
8 fairly presented to the Arizona Court of Appeals. His only foray to the Arizona Court of
9 Appeals is his now pending petition for review, which is founded upon a claim of
10 prosecutorial misconduct in failing to make disclosures. His claims in this Petition are
11 based upon the trial court’s change of the plea agreement, and ineffective assistance of
12 counsel in failing to challenge those changes.

13 Accordingly, this Court is faced with a Petition composed solely of claims for
14 which Petitioner’s state remedies are unexhausted.

15 Respondents suggest that the state remedies are not merely unexhausted, but now
16 procedurally defaulted. Ordinarily, unexhausted claims are dismissed *without prejudice*.
17 *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has
18 failed to properly exhaust his available administrative or judicial remedies, and those
19 remedies are now no longer available because of some procedural bar, the petitioner has
20 “procedurally defaulted” and is generally barred from seeking habeas relief. Dismissal
21 *with prejudice* of a procedurally defaulted habeas claim is generally proper absent a
22 “miscarriage of justice” which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11
23 (1984).

24 In support of their assertion that the claims are procedurally defaulted,
25 Respondents argue that a return to state court for a new proceeding is not possible.
26 (Answer, Doc. 12 at 12.) However, Respondents proffer no state law precluding
27 Petitioner from revising his claims in the currently pending proceeding before the
28 Arizona Court of Appeals. (See Order 9/10/13, Doc. 11 at 2 (“any allegations of

1 procedural default or application of an independent and adequate state ground shall
 2 include an indication of the specific state rule(s) and/or authorities alleged to bar the
 3 affected claim(s)).) Further, it seems particularly unseemly, in light of the comity due
 4 in our federal system (and which underlies the *Younger* abstention doctrine addressed
 5 hereinafter), for this federal court to prognosticate what the Arizona Court of Appeals
 6 might or might not do in a matter actually pending before it. Accordingly, Respondents
 7 have failed to establish that there is now no state remedy available to Petitioner.¹

8 Respondents suggest as an alternative a stay of the current petition pending
 9 completion of the state court proceedings. Respondents argue, however, that Petitioner
 10 has failed to show good cause for his failure to exhaust, and the claims are not
 11 meritorious. (See Answer, Doc. 12 at 7, quoting *Rhines v. Weber*, 544 U.S. 269, 278
 12 (2005).) However, such a stay is only appropriate for “mixed petitions,” containing both
 13 exhausted and unexhausted claims. *Rhines*, 544 U.S. at 275. See also *Jackson v. Roe*,
 14 425 F.3d 654, 661 (9th Cir. 2005) (“*Rhines* applies to stays of *mixed* petitions”).
 15 Accordingly, a stay is not appropriate.²

16 Finally, Respondents suggest that this Court exercise its discretion to deny the
 17 claims on their merits, notwithstanding a failure to exhaust state remedies.³ “An
 18 application for a writ of habeas corpus may be denied on the merits, notwithstanding the
 19 failure of the applicant to exhaust the remedies available in the courts of the State.” 28
 20 U.S.C. § 22545(b)(2). Such an approach would be appropriate if Petitioner had no state
 21 proceedings pending. In light of the pendency of his state petition for review, abstention
 22 is the more appropriate course.

23 **Abstention Appropriate** - The principles of abstention in *Younger v. Harris*, 401

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 25 ¹ Because the undersigned does not find a procedural default, Petitioner’s assertions of
 cause and prejudice and miscarriage of justice to excuse the default need not be
 26 addressed.

27 ² The Ninth Circuit has also approved a process for staying fully exhausted petitions to
 permit the exhaustion of other claims. *Jackson*, 425 F.3d at 661. Petitioner’s petition, on
 28 the other hand, is fully unexhausted.

³ Petitioner suggests the Court take the same approach to grant the Petition. Section
 2254(b)(2) only permits a bypass to *deny* the claim.

1 U.S. 37 (1971) call for dismissal of Petitioner's Petition without prejudice. "The
 2 Younger abstention doctrine generally provides that when: (1) the underlying hearings at
 3 issue constitute an ongoing state judicial proceeding; (2) the proceedings implicate
 4 important state interests; (3) there is an adequate opportunity in the state proceedings for
 5 the federal plaintiff to raise constitutional challenges; and (4) the federal action would
 6 enjoin the state proceedings or have the practical effect of doing so, federal courts should
 7 abstain." *Knight v. Ahlin*, 709 F.3d 1296, 1298 (9th Cir. 2013) (internal citations and
 8 quotation marks omitted).

9 Here, the state proceedings are ongoing.⁴ Petitioner's petition for review remains
 10 pending before the Arizona Court of Appeals. These criminal review proceedings
 11 implicate important state interests, namely "the important and necessary task of
 12 enforcing these laws against socially harmful conduct." *Younger*, 401 U.S. at 51-52.
 13 Arizona routinely provides opportunity for the consideration of the kinds of claims that
 14 Petitioner asserts in his Petition.

15 Finally, a ruling in this Court on the merits of Petitioner's claims would have the
 16 practical effect of enjoining the state proceedings, at least insofar as the Arizona court
 17 might decide to take up the claims raised in this proceeding.

18 Petitioner complains that the Arizona Court of Appeals is simply taking too long.
 19 That does not establish that the state proceeding is an inadequate opportunity to present
 20 his claims. The matter has only been at issue in that court for six months. While that
 21 may seem an eternity for a prisoner, it would be a routine delay in the vast majority of
 22 appellate courts, state and federal. For example, the federal Ninth Circuit Court of
 23 Appeals reports a 4-5 month delay between briefing and oral argument, and 3 months to
 24 a year from then to a decision. *See* <http://www.ca9.uscourts.gov/content/faq.php>, last
 25 accessed 12/11/13.

26 Nor does it show the kinds of extraordinary circumstances under which a federal

27 ⁴ In the event that the state proceedings are concluded prior to the ruling on this Report
 28 and Recommendation, then the undersigned would suggest the matter be referred again
 to address the procedural default issues.

1 court may interfere with ongoing state proceedings. “[W]hen absolutely necessary for
 2 protection of constitutional rights, courts of the United States have power to enjoin state
 3 officers from instituting criminal actions. But this may not be done, except under
 4 extraordinary circumstances, where the danger of irreparable loss is both great and
 5 immediate.” *Younger*, 401 U.S. at 45. An ordinary delay in appellate review does not
 6 establish such extraordinary circumstances. *See Roberts v. Dicarlo*, 296 F. Supp. 2d
 7 1182 (C.D.Calif. 2003) (no extraordinary circumstances to avoid *Younger* abstention
 8 from 17 month delay in direct appeal).

9 “When, as in the present case, an appeal of a state criminal conviction is pending,
 10 a would-be habeas corpus petitioner must await the outcome of his appeal before his
 11 state remedies are exhausted, even where the issue to be challenged in the writ of habeas
 12 corpus has been finally settled in the state courts.” *Sherwood v. Tomkins*, 716 F.2d 632
 13 (9th Cir. 1983).

14 **Dismissal Without Prejudice Appropriate** - Dismissal is the appropriate means
 15 to abstain in this case. While a stay is permitted in cases merely involving a claim at law
 16 for damages, *see Gilbertson v. Albright*, 381 F.3d 965 (2004), in a case seek equitable
 17 relief such as a habeas proceeding, dismissal is the appropriate response.

18 There is no apparent prejudice to Petitioner from a dismissal. Often, federal
 19 habeas courts are faced with the potential of a dismissal without prejudice becoming one
 20 with practical prejudice as a result of the intervening expiration of the one year habeas
 21 statute of limitations. *See* 28 U.S.C. § 2244(d). In this instance, Petitioner’s sentence
 22 was entered on February 22, 2011. (*See* Exhibit E, R.T. 2/22/11.) His PCR notice was
 23 filed less than six months later on July 26, 2011. (*See* Exhibit H, PCR Notice.) That
 24 proceeding remains pending. Accordingly, Petitioner would have at least sixth months
 25 of his one year limitations period remaining upon conclusion of his state court
 26 proceedings.⁵

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⁵ It is unclear whether Petitioner’s pending PCR proceeding should be considered an “of-right” proceeding, and thus part of his direct review. *See Summers v. Schriro*, 481 F.3d

Moreover, a dismissal of the instant petition would not raise concerns of a “second or successive” petition under 28 U.S.C. § 2244(b). “A habeas petition is second or successive only if it raises claims that were or could have been adjudicated on the merits...A prior petition that has been dismissed without prejudice for failure to exhaust state remedies leaves open the possibility for future litigation and has not, therefore, been adjudicated on the merits.” *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009) (citations omitted).

Accordingly, the instant petition should be dismissed without prejudice.

IV. CERTIFICATE OF APPEALABILITY

Ruling Required - Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the “district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Such certificates are required in cases concerning detention arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant to a State court judgment. The recommendations if accepted will result in Petitioner’s Petition being resolved adversely to Petitioner. Accordingly, a decision on a certificate of appealability is required.

Applicable Standards - The standard for issuing a certificate of appealability (“COA”) is whether the applicant has “made a substantial showing of the denial of a constitutional right.”28 U.S.C. § 2253(c)(2). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*

710, 716-717 (9th Cir. 2007). If so, then Petitioner’s one year limitations period would arguably not begin running until the conclusion of that proceeding.

1 *McDaniel*, 529 U.S. 473, 484 (2000). “When the district court denies a habeas petition
2 on procedural grounds without reaching the prisoner’s underlying constitutional claim, a
3 COA should issue when the prisoner shows, at least, that jurists of reason would find it
4 debatable whether the petition states a valid claim of the denial of a constitutional right
5 and that jurists of reason would find it debatable whether the district court was correct in
6 its procedural ruling.” *Id.*

7 **Standard Not Met** - Assuming the recommendations herein are followed in the
8 district court's judgment, that decision will be on procedural grounds as to Ground One.
9 Under the reasoning set forth herein, the undersigned finds that "jurists of reason" would
10 not "find it debatable whether the district court was correct in its procedural ruling" on
11 that ground.

12 Accordingly, to the extent that the Court adopts this Report & Recommendation
13 as to the Petition, a certificate of appealability should be denied.

14 As for Ground Two, the undersigned did not participate in the dismissal of that
15 claim, and out of deference to the district judge, makes no recommendation as to the
16 appealability of that order.

V. RECOMMENDATION

19 **IT IS THEREFORE RECOMMENDED** that the Petitioner's Petition for Writ
20 of Habeas Corpus, filed May 6, 2013 (Doc. 1) be **DISMISSED WITHOUT**
21 **PREJUDICE.**

22 **IT IS FURTHER RECOMMENDED** that to the extent the reasoning of this
23 Report & Recommendation is adopted, a Certificate of Appealability be **DENIED** as to
24 Ground One.

VI. EFFECT OF RECOMMENDATION

27 This recommendation is not an order that is immediately appealable to the Ninth
28 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules*

of Appellate Procedure, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also Rule 8(b), Rules Governing Section 2254 Proceedings.* Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated: December 18, 2013

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James F. Metcalf
United States Magistrate Judge